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Can Amnesties and International Justice be Reconciled?

Louise Mallinder*

Abstract¹

When states are attempting to recover from periods of serious human rights abuse, they often must try to reconcile the competing demands of different stakeholders. These demands may range from claims that complete impunity is a necessary sacrifice to achieve peace, to the belief that without justice no meaningful peace can be reached. This paper will attempt to highlight the ways in which international courts and quasi-judicial bodies address the dilemma of peace versus justice, in relation to amnesty laws. The discussion will consider the main international standards on impunity, the international jurisprudence relating to amnesties and whether international courts should recognize amnesties that are accompanied by alternative forms of justice. This paper will argue that international courts should recognize amnesties that are introduced with democratic approval to promote peace and reconciliation, provided that they are accompanied by mechanisms to fulfil the victims' rights.

Introduction

Since the early 1990s, advocates of international justice have increasingly described measures such as the establishment of international and hybrid tribunals to address serious human rights violations as crucial for the reestablishment of the rule of law and the promotion of reconciliation within states that have been torn apart by violence and criminality.² This position is disputed by proponents of amnesties, including politicians, diplomats, academics and some sectors of civil society, who contend that formal international prosecutions may be unlikely to contribute to reconciliation between previously antagonistic groups, whereas amnesties might help to reduce the violence and create a climate in which moves towards reconciliation could be pursued.

The arguments in favor of amnesty in transitional states usually contend that peace could never be achieved without some form of amnesty, as combatants

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¹ The author would like to thank Profs. Tom Hadden, Kieran McEvoy, Vojin Dimitrijevic and William Schabas for their comments and encouragement.

² See for example, Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' *American Journal of International Law* 95(1) (2001): 7–31; Amnesty International, *Sierra Leone: Special Court for Sierra Leone: Denial of the Right to Appeal and Prohibition of Amnesties for Crimes Under International Law* (2003); Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court,' *International and Comparative Law Quarterly* 51(1) (2002): 91–117.

would be unlikely to surrender their weapons and dictators would be unwilling to transfer power to democrats.³ Furthermore, academics have argued that if, after a war, the victors impose conditions that ‘involve crushing the dignity of the vanquished, the peace will not last,’⁴ perhaps because, as Hadden contends, ‘strict punishment of all violators may serve to maintain rather than reconcile the differing recollections and attitudes of the various communal or political groups from which the conflict arose.’⁵ The position is particularly delicate where there is no clear victor in a conflict, and little international intervention either to end the violence or to establish justice mechanisms. In such circumstances, any political settlement has to be a compromise between the different parties, as an attempt by one side to punish its opponents could reignite the violence.⁶ Instead, it has been suggested that it is better ‘to quell the need for vengeance’ among those who have been defeated by implementing policies of compromise and forgiveness.⁷ Being merciful to former enemies whilst attempting to address the root causes of the conflict could reduce the justification for further violence, promote the development of the conditions for reconciliation and strengthen the establishment of human rights institutions.

These arguments in favor of amnesties appear to be borne out in state practice. Based on the Amnesty Law Database,⁸ created by the author, which contains data on amnesties granted in all parts of the world since the end of World War Two, it appears that over 420 amnesty processes have been introduced during this period, with many of them occurring since the establishment of ad hoc tribunals. Indeed,

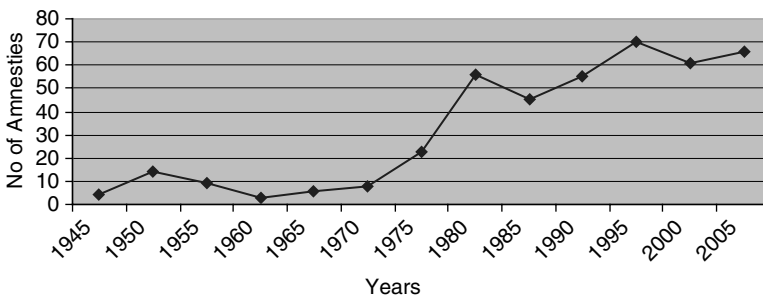


Fig. 1 Amnesties by year. Source: Amnesty Law Database.

³ See for example, Raúl Alfonsín, ‘Never Again in Argentina,’ *Journal of Democracy* 4(1) (1993): 15–19; Leila Nadya Sadat, ‘Exile, Amnesty and International Law,’ *Notre Dame Law Review* 81(3) (2006): 955–1036.

⁴ Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Hague: Kluwer Law International, 2002), 25.

⁵ Tom Hadden, ‘Punishment, Amnesty and Truth: Legal and Political Approaches,’ in *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies*, ed. Adrian Guelke (Basingstoke: Palgrave Macmillan, 2004), 212.

⁶ Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp: Intersentia, 2004), 32–3.

⁷ O’Shea, *supra* n 4 at 24–5.

⁸ The author intends to make this database available online during 2008.

over 66 amnesties were introduced between January 2001 and December 2005. The distribution of amnesty processes over time can be seen in Figure 1. This shows that amnesties have continued to be a political reality despite international efforts to combat impunity. For this reason, this paper will argue that international courts should focus their limited prosecutorial resources on combating the most egregious forms of impunity and recognize amnesties that are introduced with democratic approval to promote peace and reconciliation if these are accompanied by mechanisms to fulfil victims' rights.

This paper will begin by analyzing the international legal principles to combat impunity; namely, the rights to a remedy, truth, justice and reparations, before examining the case law of international courts on amnesties. Finally, the paper will consider whether international courts can recognize amnesties that are accompanied by alternative forms of justice, such as truth commissions, community-based justice systems and reparations. The validity of amnesties that have democratic approval or that allow selective prosecutions of those who are 'most responsible' will also be considered.

International Legal Principles to Combat Impunity

When considering the attitudes of the international courts and quasi-judicial bodies to amnesties, a distinction should be drawn between institutions whose jurisdiction applies to individuals and those whose jurisdiction applies to states. The courts that hold individuals accountable – namely the ad hoc and hybrid tribunals – and the International Criminal Court (ICC) consider whether perpetrators are entitled to use amnesties to shield themselves from prosecution. In contrast, the regional and universal human rights mechanisms that hold states accountable consider whether states have violated their obligations under international law by introducing amnesties, which is possible even where amnesties are valid under national law. The obligations that states are most likely to have violated include the duties to guarantee the victims' rights to a remedy, truth, justice and reparations. This denial of rights can potentially aggravate the suffering of victims in many ways including continuing their sense of alienation from society and inhibiting their ability to access state services and obtain compensation.⁹ Amnesty for lower-level offenders could also mean that in their daily life, victims are frequently confronted by the individuals who caused their suffering, which could cause further harm to the victims and even lead them to engage in vigilantism.¹⁰ However, it will be argued below that individualized, conditional amnesties in conjunction with other transitional justice mechanisms can, if well designed, actually contribute to guaranteeing each of the victims' rights.

⁹ See for example, Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims?' *Harvard International Law Journal* 46 (2005): 295–345.

¹⁰ Ronald C. Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights,' *Wisconsin International Law Journal* 22 (2004): 99–123.

Right to a Remedy

The right to a remedy is a composite right that is contained in the general human rights treaties¹¹ and has been recognized in the jurisprudence of the international courts.¹² The key elements have been defined in the United Nations' *Basic Principles and Guidelines on the Right to a Remedy* as consisting of the victims' rights to 'equal and effective access to justice,' 'adequate, effective and prompt reparation for harm suffered' and 'access to relevant information concerning violations and reparation mechanisms.'¹³ States must fulfill each of these elements to avoid breaching victims' right to a remedy. The rights to truth and reparations will be dealt with later in the article, and the remainder of this section will consider victims' right to access justice.

This right was described in the *Basic Principles and Guidelines* as the right of a victim of 'a gross violation of human rights law or of a serious violation of international humanitarian law' (i.e., not explicitly limited to victims of international crimes) to have 'equal access to an effective judicial remedy as provided for under international law.' The *Basic Principles and Guidelines* continue, however, that 'other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.'¹⁴ However, the *Basic Principles and Guidelines* also stipulate that:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, *the duty to submit to prosecution* the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.¹⁵

The emphasis here appears to be on judicial remedies, although it is recognized that other forms of recourse for crimes, which do not meet the threshold of international crimes could be acceptable. This distinction is significant because, as will be seen below, many crimes that occur during wars or dictatorships may not reach this threshold.

The recognition of other acceptable forms of recourse is also supported by Article 17(1)(a) of the Rome Statute, relating to the principle of complementarity,¹⁶ which provides that 'the Court should find a case inadmissible where ... the

¹¹ See for example, International Covenant on Civil and Political Rights, art. 2(3).

¹² See for example, *Aksoy v. Turkey*, judgment of 18 December 1996, European Court of Human Rights, *Reports of Judgments and Decisions* 1996-VI [98]; *Barrios Altos Case (Chumbipuma Aguirre et al. v. Peru)* Inter-Am. Ct. H. R. (ser. C) No. 74 (2001) [43].

¹³ United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Res. 60/147 (16 Nov. 2005) [hereinafter '*Basic Principles and Guidelines*'], Princ 11. This is not intended to be a legally binding document, but rather to reflect the existing legal obligations of states under international human rights and humanitarian law.

¹⁴ *Ibid*, Princ 12.

¹⁵ *Ibid* (emphasis added).

¹⁶ For a discussion of amnesty and the principle of complementarity see for example, Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for

case is being investigated or prosecuted by a state which has jurisdiction over it.¹⁷ This permits the ICC to intervene only where the territorial state is unwilling or unable to genuinely either investigate or prosecute a case. It seems clear that under this article, a blanket amnesty that was designed to prevent the facts becoming known would be taken as evidence of a state's unwillingness to investigate. However, individualized conditional amnesties that provide for investigations and reparations may be viewed more leniently. This more flexible approach is reflected in Article 17(1)(b) which provides that the ICC should declare a case inadmissible where:

the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute.¹⁸

Robinson interprets this provision as applying to cases such as the South African Truth and Reconciliation Commission (TRC) where prosecution remained possible for all amnesty applicants, unless the Amnesty Committee *decided* that it had complied with the conditions outlined in the 1995 Promotion of National Unity and Reconciliation Act.¹⁹ According to this Act, the amnesty did not aim to shield individuals from prosecution, but rather to assist with effective truth recovery, and it could therefore potentially be used by the ICC as evidence of domestic investigations, which offer a remedy to victims and to which the ICC prosecutor should defer.

Right to Truth and the Duty to Investigate

The right to truth is not explicitly referred to in the general human rights instruments or subject-specific conventions, with the possible exception of the right of every individual to 'receive information' contained in the African Charter on Human and Peoples' Rights.²⁰ Despite this, Hayner asserts that within the duty of states to investigate and punish violations of human rights 'is the inherent right of the citizenry to know the results of such investigations.'²¹ This view is articulated in the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*.

the International Criminal Court,' *Journal of International Criminal Justice* 3 (2005): 695–720; Informal Expert Paper, *The Principle of Complementarity in Practice* (Hague: International Criminal Court, 2003); Mohamed M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law,' *Michigan Journal of International Law* 23 (2002): 869–974.

¹⁷ Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002 [hereinafter 'ICCSt.'], art. 17(1)(a).

¹⁸ ICCSt. art. 17(1)(b).

¹⁹ Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,' *European Journal of International Law* 14 (2003): 481–506.

²⁰ African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986) art. 19(1).

²¹ Priscilla B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study,' *Human Rights Quarterly* 16(4) (1994): 611.

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.²²

This formulation does not appear to distinguish international crimes from human rights violations that do not reach that threshold. The *Updated Set of Principles* further asserts that society has:

the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about circumstances and reasons which led, through massive or systematic violations, to the perpetration of those crimes.²³

This formulation reflects the approach taken by the European Court of Human Rights²⁴ and the Inter-American Court.²⁵ The *Updated Set of Principles* also highlights commissions of inquiry and the preservation of archives as means of ensuring the right to truth.²⁶

In relation to amnesties, commissions of inquiry are usually required to investigate the crimes committed by the individuals applying for amnesty. In some instances, these investigations are limited and merely seek to establish that the individuals have not perpetrated any crimes that are excluded from the terms of the amnesty. In other instances, usually in truth commissions, the individuals could be required to make a full disclosure of all crimes they have committed before being granted amnesty and failure to cooperate fully with the commission could result in the amnesty being withheld and the applicants possibly facing criminal prosecution. The limited investigations do little to ensure the right to truth,²⁷ but granting amnesty in exchange for truth can result in the victims and society gaining credible information about the events that occurred during the period of violence.²⁸

Duty to Prosecute and Punish

Since World War Two, the international community has elaborated treaties to prohibit and penalize certain international crimes including genocide, grave breaches of the Geneva Conventions and torture. These treaties place obligations on states to prosecute or extradite individuals suspected of perpetrating the crimes that

²² *Report of the Independent Expert to update the set of principles to combat impunity*, Diane Orentlicher, UN Doc. E/CN.4/2005/102 9(18 February 2005) [hereinafter '*Updated set of principles*'], Princ 4. These principles have a similar status to the *Basic Principles and Guidelines*.

²³ *Ibid*, Princ 1.

²⁴ See for example, *Hugh Jordan v. the United Kingdom*, no. 24746/94, Eur. Ct. H. R., ECHR 2001-III [123–4].

²⁵ See for example, *Castillo Páez v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 34 (1997) [90].

²⁶ *Updated Set of Principles*, supra n 22, Princs 6–18.

²⁷ For a discussion of how such commissions of inquiry frequently fail to be effective, see, Amnesty International, *Algeria: Truth and Justice Obscured by the Shadow of Impunity* (2000).

²⁸ For a discussion of the amnesty in exchange for truth model, see, Kader Asmal, 'Truth, Reconciliation and Justice: The South African Experience in Perspective,' *Modern Law Review* 63(1) (2000): 1–24; Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Cape Town: Oxford University Press, 2000).

they prohibit. However, these treaties do not always apply to situations of widespread violence. For example, international humanitarian law does not impose an obligation to prosecute crimes committed during internal conflicts. This means that most conflicts since World War Two have not given rise to an obligation to prosecute under international humanitarian law. Similarly, the definition of genocide in the 1948 Genocide Convention excludes the 'extermination of a group on political grounds,'²⁹ which excludes situations such as the South American 'dirty wars' where large numbers of people were killed for their supposed political beliefs.

In addition to the international crimes prohibited under treaty law, it can be argued that there is a developing obligation to prosecute crimes against humanity under customary international law, as reflected by the codification of crimes against humanity in Article 7 of the Rome Statute. However, states continue to introduce amnesties for international crimes, including crimes against humanity. The Amnesty Law Database shows that since the UN changed its approach to amnesty laws with the signing of the Lomé Accord on 7 July 1999,³⁰ 29 amnesty laws have excluded some form of international crimes and 24 amnesty laws have granted immunity from criminal prosecution for such crimes. Consequently, it is too early to suggest that an international legal custom relating to the prosecution of international crimes is developing, and it cannot yet be said that the customary duty to prosecute crimes against humanity is mandatory. Furthermore, for much of the period since the Nuremberg judgments, 'crimes against humanity' have been understood to require a nexus to armed conflict. Although the International Criminal Tribunal for the Former Yugoslavia (ICTY) has moved away from this position and delegates to the Rome Conference declined to include it in the ICC Statute,³¹ this nexus may still apply for crimes against humanity committed during much of the post-war period.

The duty to prosecute under international law therefore does not appear to preclude amnesties for all serious human rights abuses as treaty law is not extensive enough to cover all situations, and the duty to prosecute crimes against humanity under customary international law is not yet clearly established. Furthermore, where there is a clear duty to prosecute (for example, for individuals who commit grave breaches of the Geneva Conventions) a state may not be required to prosecute *every* perpetrator, as this would not be a realistic obligation. Therefore, as will be explored below, approaches that couple selective prosecutions for the 'most responsible' with amnesty for lower-level offenders may be permissible, if these approaches are accompanied by mechanisms to ensure the rights of the victims.

²⁹ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 90.

³⁰ For a discussion of the UN disclaimer see, Simon Chesterman, 'Rough Justice: Establishing the Rule of Law in Post-Conflict Territories,' *Ohio State Journal on Dispute Resolution* 20 (2005): 69–98; William A. Schabas, 'Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,' *University of California Davis Journal of International Law and Policy* 11 (2004): 145–169.

³¹ Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference,' *American Journal of International Law* 93(1) (1999): 45–46.

Right to Reparation

The right to reparation is not specifically addressed under existing international human rights conventions, although all the main instruments affirm a 'right to a remedy,' which can be understood to provide *inter alia* a right to reparations for harm suffered. The importance of the right to reparation has been supported in the decisions of the international courts,³² and it has been recognized in Rule 106 of the Rules of Procedure and Evidence of *ad hoc* tribunals and Article 75 of the Rome Statute.

Reparations can be related to amnesty laws in several ways. Firstly, amnesties can provide reparations to individuals who have been penalized or imprisoned for their alleged political or religious beliefs. Amnesties that are granted to restore the dignity and status of those who have been oppressed, and to clear their criminal record, are not problematic under international law. In contrast, when amnesties are issued to perpetrators of human rights violations, the amnesty itself can violate victims' human rights, and should then be remedied. For example, amnesties can prevent victims obtaining reparation for the suffering they endured by prohibiting civil proceedings or by making investigations too difficult to enable such proceedings to succeed. An appropriate reparations package could therefore include repealing the law in question. Amnesties could include provisions on reparations or could be accompanied by legislation to provide financial compensation for victims and their families, facilitate the victims' right to file a civil suit, uncover the truth about the violations, memorialize the suffering of the victims and prevent such violations re-occurring.

Response of International Courts and Quasi-judicial Bodies to Amnesty Laws

The response of international courts and quasi-judicial bodies to amnesty laws has differed between regions, with the Inter-American system providing the most active consideration. This began with the Inter-American Court in the *Velásquez Rodríguez* case, relating to enforced disappearance in Honduras, which established an important principle that has been cited in subsequent judgments on amnesty laws by the Inter-American Court and Commission. In its ruling, the court declared that the state must:

use the means at its disposal to carry out investigations of violations committed within its jurisdiction, to identify those responsible, impose appropriate punishment and ensure the victim adequate compensation.³³

However, these succinct descriptions of the nature of a state's obligations do not provide much detail on the scope of these rights. For example, in the case of disappearances, does the duty to investigate entitle the victim's family to discover that their relative was killed by state forces? Do family members have the right to learn

³² *Aloeboetoe et al. v. Suriname*, Inter-Am. Ct. H. R. (ser. C) No. 11 (1991).

³³ *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

about the victim's final moments? Do they have the right to learn the names of those responsible? Finally, do they have the right to have the remains returned? If it was decided that the right to truth covered all these elements, fulfilling them could prove problematic where there are mass graves and only limited resources available for exhuming and identifying the victims. In most instances, the courts have held that the right to truth requires that victims receive an explanation of why the events that caused their suffering occurred³⁴ and be informed of the perpetrators' identity.³⁵

Solely providing the right to truth is not adequate, however, to fulfill a state's obligations, as the Inter-American Commission recognized in *Garay Hermosilla et al. v. Chile*, which concerned the impact of an amnesty on the investigation into the disappearance of 70 individuals in Chile. In this case, the commission found that truth commissions and reparations programs are 'not sufficient to guarantee respect for the human rights of the petitioners ... as long as they are denied the right to justice.'³⁶ The commission made similar determinations in cases relating to the Argentinian³⁷ and Salvadorean³⁸ truth commissions. Here, the commission reasoned that these institutions did not satisfy the state's obligations because of the lack of any legal recourse for victims, the nonjudicial nature of the truth commissions, the limitation of their work in identifying the victims and not the perpetrators and, in the case of the Argentinian truth commission, the inability to publish the perpetrators' names or to impose any punishment.

The obligation to provide justice was addressed by the Inter-American Court in the *Barrios Altos* case, where an amnesty had been applied to an investigation of the 1991 massacre of 15 people in the Barrios Altos district of Lima. The Inter-American Court held that the Peruvian amnesty laws violated Article 1(1) of the American Convention on Human Rights because 'they prevented the ... prosecution and conviction of those responsible.'³⁹ However, in its ruling, the court did not order that the perpetrators be prosecuted. It held instead that:

the state of Peru should investigate the facts to determine the identity of those responsible for the human rights violations referred to in this judgment, and also publish the results of this investigation and punish those responsible.⁴⁰

Therefore, although the court held that the perpetrators should be punished, it did not order the overturning of the amnesty to allow criminal punishment, which seems to suggest the possibility of imposing noncriminal sanctions. This

³⁴ Ibid, para 90.

³⁵ Ibid, para 174.

³⁶ *Garay Hermosilla et al. v. Chile*, Case 10.843, Inter-Am. C.H.R., Report 36/96, OEA/Ser.L/V/II/95 (1996) [58].

³⁷ *Alicia Consuelo Herrera et al. v. Argentina*, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Inter-Am. C.H.R., Report 28/92, OEA/Ser.L/V/II.83 (1992).

³⁸ *Lucio Parada Cea et al. v. El Salvador*, Case 10.480, Inter-Am. C.H.R., Report 1/99, OEA/Ser.L/V/II.102 (1999).

³⁹ *Barrios Altos* case, *supra* n 12 [42].

⁴⁰ Ibid.

approach was followed by most of the courts and quasi-judicial bodies, which consistently ordered or recommended reparations, usually financial compensations. Increasingly though, some institutions are recommending other forms of reparations, including erecting memorials or making public apologies.⁴¹

Despite finding that amnesty laws violate a victim's right to a remedy, the courts have occasionally recognized that 'in certain circumstances, it may be difficult to investigate acts which violate an individual's rights'⁴² because of political instability. Similar recognition is provided by Article 16 of the Rome Statute, which permits the UN Security Council, in accordance with Chapter VII of the UN Charter, to defer prosecutions for renewable periods of one year in the interests of peace and security. Recognizing this difficulty could have resulted in international courts outlining the minimum requirements that transitional justice processes must fulfill for an amnesty to be acceptable, but this has not occurred to date. This could be due to reluctance among jurists to risk destabilizing a transition or inhibiting the freedom of governments to choose their own path through a political transition, particularly in response to the recent trend for amnesty processes to include mechanisms to fulfill the rights of victims to truth and reparations.⁴³

Where courts that hold individuals to account are reluctant to explore the extent of the legal principles relating to amnesty, this reluctance could imply simply that they view amnesties as incidental questions to be addressed before they can consider the merits of the case.⁴⁴ Therefore, such courts often address amnesties only in relation to particular events or violations. This is coupled with a prosecutorial strategy of targeted prosecutions of those who are 'most responsible.' Therefore, to date, most international judgments that discuss the legitimacy of amnesty laws have focused on the obligations of states to adhere to their commitments under international human rights law, rather than individual criminal prosecutions. The remainder of this paper will investigate the circumstances under which international courts could choose to defer to national amnesties.

Should International Courts Respect Some Forms of Amnesty?

As discussed above, international courts have traditionally been reluctant to address the differing forms of amnesty, but it is likely that they will eventually have no choice. The ICC's investigation into the situation in Uganda will probably

⁴¹ See for example, *Barrios Altos case (Chumbipuma Aguirre et al. v. Peru)*, Inter-Am. Ct. H. R. (ser. C) No. 87 (2001); *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H. R. (ser. C) No. 101 (2003).

⁴² *Velásquez Rodríguez v. Honduras*, supra n 33 [177].

⁴³ For example, the South African TRC took a more restorative approach to justice, which enabled it to grant amnesty in exchange for truth whilst ensuring the process took into account the needs of the victims.

⁴⁴ See for example, Decision on challenge to jurisdiction: *Lomé Accord Amnesty in Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, SCSL-2004-15-PT-060-I, SCSL-2004-15-PT-060-II, Appeal (13 March 2004).

provide the most immediate challenge, as although the Ugandan parliament passed an amendment to the 2000 Amnesty Act⁴⁵ on 20 April 2006 to exclude the Lord's Resistance Army (LRA) leader, Joseph Kony, and his top commanders from the amnesty,⁴⁶ the Ugandan president has subsequently offered assurances to Kony that he and his comrades would not be prosecuted if they surrendered.⁴⁷ Furthermore, in addition to confronting pre-existing amnesty laws, transitional states may in the future consult the ICC when designing mechanisms to address past human rights violations.⁴⁸ Such determinations could involve the ICC and other international courts in assessing the validity of amnesties against several criteria that will be discussed below.

Amnesty and the Pursuit of Justice

Amnesty is frequently described as a denial of justice, but this section will argue that in certain circumstances amnesty can promote justice, where a broad understanding of the term is adopted.

'In the Interests of Justice'

As discussed previously, the question of whether prosecutions are always 'in the interests of justice' has been disputed by those who believe that in certain situations attempting prosecutions might cause the violence to continue.⁴⁹ In such cases, amnesties could arguably contribute to peace and stability by providing opportunities for ceasefires and negotiations to occur. This view has received some recognition in Article 53 of the Rome Statute, which relates to the initiation of an investigation or prosecution and awards the ICC prosecutor considerable discretion when deciding whether to proceed, subject to review by the Pre-Trial Chamber. This article does not explicitly address amnesty laws,⁵⁰ possibly as a result of some constructive ambiguity during the negotiating process.⁵¹ It does stipulate, however, that in making his decision, the prosecutor shall foreclose investigations that 'would not serve the interests of justice,' even after having taken 'into account the gravity of the crime and the interests of victims.'⁵² This shows that 'despite the tests of severity and the interests of victims being satisfied, the

⁴⁵ The Amnesty Act of 2000 is intended to encourage demobilization and reintegration of all rebel groups in Uganda, not specifically the LRA. It offers immunity from prosecution to those combatants who give themselves up willingly and denounce their rebellion.

⁴⁶ Apollo Mubiru and Cyprian Musoke, 'Kony Denied Amnesty,' *New Vision*, April 20, 2006.

⁴⁷ 'ICC: The LRA Wants to Negotiate with Uganda,' *International Justice Tribune*, May 22, 2006.

⁴⁸ Jann K. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive Criminal Law,' *Journal of International Criminal Justice* 1(1) (2003): 86–113.

⁴⁹ See for example, Chris Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?' *King's College Law Journal* 14(2) (2004): 179–198.

⁵⁰ In fact, the issue of amnesty laws is not mentioned explicitly anywhere in the Rome Statute, although it was discussed during negotiations.

⁵¹ Mahnouch H. Arsanjani, 'The Rome Statute of the International Criminal Court,' *American Journal of International Law* 93 (1999): 22–43.

⁵² ICCSt. art. 53(1)(c).

interests of justice may “nonetheless” act to defeat the satisfaction of these and other case-specific criteria.⁵³

Article 53 allows the prosecutor to make a decision that is ‘entirely political,’ in that ‘he would have to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other.’⁵⁴ In making this decision, the prosecutor would have to consider the political context, the nature of the amnesty law itself and whether it was introduced following a transparent decision-making process where the victims’ views were heard.⁵⁵ The prosecutor would also have to consider whether other forms of justice were available. Furthermore, in determining whether to proceed, the prosecutor must recognize that the needs of individuals for justice do not always complement the needs of whole societies for peace. The prosecutor must therefore balance whether to apply a utilitarian standard by declining to prosecute where the criminal indictment could result in continued or increased suffering for a larger number of people than would suffer from the denial of justice for individuals who were previously marginalized and oppressed. There is some evidence that the current ICC prosecutor, Luis Moreno-Ocampo, is prepared to incorporate such political factors when deciding whether to initiate an investigation. For example, in an address to the UN Security Council he declared:

I am ... required by the Rome Statute to consider whether a prosecution is not in the interests of justice. In considering this factor I will follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of crimes.⁵⁶

Similarly, at an international conference in September 2005, Moreno-Ocampo asserted that ‘amnesties are an example of local justice,’ and he called upon academics to develop standards to integrate the activities of the ICC with ‘other initiatives, such as local mechanisms.’ He stated that a flexible approach was necessary as the ICC ‘cannot prosecute every single perpetrator’ and its temporal jurisdiction prevents it investigating crimes before July 2002, and that to operate effectively, the Court must convince other actors to work closely with it.⁵⁷ The forms of ‘local justice’ that the ICC prosecutor was anticipating are likely to include restorative justice processes.

⁵³ Gallavin, *supra* n 49 at 185.

⁵⁴ William Bourdon, ‘Amnesty’ in *Crimes of War Book*, ed. Roy Gutman and David Rieff, trans. Francis Hodgson (Chichester, UK: John Wiley and Sons Limited, 1999).

⁵⁵ Thomas Hethe Clark, ‘The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”: Striking a Delicate Balance,’ *Washington University Global Studies Law Review* 4 (2005): 409. See also, Richard J. Goldstone and Nicole Fritz, “In the Interests of Justice” and Independent Referral: The ICC Prosecutor’s Unprecedented Powers,’ *Leiden Journal of International Law* 13(3) (2000): 655–67.

⁵⁶ Luis Moreno-Ocampo, *Address to the United Nations Security Council* (13 December 2005) available at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051213_En.pdf (accessed 15 February 2007).

⁵⁷ Luis Moreno-Ocampo, ‘Integrating the Work of the ICC into Local Justice Initiatives,’ *American University International Law Review* 21 (2006): 500–2.

A Broader Conception of Justice

When considering whether prosecutions are in the interests of justice, it must be remembered that there are different forms of justice, which have varying legitimacy among different communities. Western criminal models focus on the more retributive elements of justice, whereas many societies in Africa and elsewhere prefer to rely on more restorative methods.⁵⁸ These approaches differ, as more retributive systems focus on the crime and the appropriate punishment while restorative systems emphasize the harm and the need to repair relationships. Minow describes the aim of restorative justice as 'to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships and in future behavior.'⁵⁹ This shows that the objectives of restorative justice are both backward looking, in addressing past crimes, and forward looking, in seeking to contribute to the establishment of a more equal and harmonious society.⁶⁰ To achieve its goals, a restorative justice process must take a holistic approach to crimes by bringing together victims, offenders and representatives of their respective communities.⁶¹ Victims must be given a central role in which they can describe their suffering, have their pain acknowledged and receive reparations for the harm they have endured. Offenders, whilst being encouraged to take responsibility for their actions, should be treated with respect. The involvement of representatives of the communities to which the victims and offenders belong is significant, particularly in transitional societies, as restorative justice processes recognize that crime does not simply affect individuals, but society as a whole, with individual members of different communities perpetrating different acts that reflect upon the entire community.⁶² Restorative approaches can be suitable where formal Western-style retributive prosecutions are not possible because of practical and political constraints, or where restorative mechanisms are the preferred approach to justice, which is the case in many societies in Africa and elsewhere.

To date, there have been several examples where amnesty laws have been introduced in conjunction with community-based justice processes. For example, the Acholi people of northern Uganda, who have suffered greatly from the acts of the

⁵⁸ For examples of societies that rely on restorative justice to settle disputes, see, Carola Eyber and Alastair Ager, 'Conselho: Psychological Healing in Displaced Communities in Angola,' *Lancet* 360 (2002): 871; Pat Howley, *Breaking Spears and Mending Hearts: Peacemakers and Restorative Justice in Bougainville* (London: Zed Books, 2002); and Joanna Stevens, *Access to Justice in Sub-Saharan Africa* (London: Penal Reform International, 2000).

⁵⁹ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 91.

⁶⁰ Guillermo Kerber, 'Overcoming Violence and Pursuing Justice: An Introduction to Restorative Justice Procedures,' *Ecumenical Review* (April 2003): 151–7. See also, Jennifer J. Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission,' *University of Toronto Law Journal* 49 (1999): 374–5.

⁶¹ Kerber, *supra* n 60 at 154; see also, John Braithwaite, 'Principles of Restorative Justice' in *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* ed. Andrew Von Hirsch et al. (Oxford: Hart Publishing, 2003), 1–20.

⁶² Kerber, *supra* n 60 at 155–6.

LRA, use their traditional dispute resolution mechanisms, known as *nyouo tong gweno* and *mato oput* to reintegrate former combatants into society. These traditional processes are currently being debated for codification and the ICC prosecutor has expressed his intention to 'integrate the dialogue for peace, the ICC and traditional justice and reconciliation processes.'⁶³ In this way, amnesty accompanied by traditional community-based justice mechanisms can co-exist with international prosecutions for those who are 'most responsible.' Furthermore, amnesty could be used in conjunction with restorative justice mechanisms to encourage perpetrators to participate without inculcating themselves. This was the approach followed by the South African TRC.⁶⁴

Although punishment is not the objective of restorative justice, it often results in alternative forms of punishment such as public identification, community service, financial contribution to compensation for victims or public apologies being agreed to by the participants. Such measures would help to fulfill the victims' rights to reparations. In these instances, amnesty could be conditional on the offenders' complying with the penalties imposed by the restorative justice mechanism and could therefore work as an enforcement mechanism and a way of reassuring victims of the genuineness of the process. The flexibility of the restorative justice approach to punishment offers the opportunity for amnesty to be reconciled with a justice process in which the needs of victims are acknowledged. Perpetrators might also have to perform appropriate cultural or religious rituals to show their desire to change and become reintegrated into society.⁶⁵ This could enable the amnesty to be granted in a context of societal forgiveness and reconciliation.

In deciding whether to respect a restorative justice approach that offers perpetrators the possibility of amnesty, international courts must consider whether the process has been introduced in good faith to foster reconciliation, to promote truth, to provide victims with a forum to reveal their suffering and receive acknowledgment and to offer reparations to victims. International courts could complement the work of restorative justice processes by threatening former leaders who have used their position to embezzle funds and impoverish the country with prosecution if they failed to transfer their wealth to reparations programs for victims.⁶⁶

Only the 'Most Responsible'

The international and hybrid tribunals focus their prosecutorial resources on those who are deemed 'most responsible.' This category of individuals is usually

⁶³ ICC, Press Release: Joint Statement by ICC Chief Prosecutor and The Visiting Delegation of Lango, Acholi, Iteso and Madi Community Leaders from Northern Uganda, No.: ICC-OTP-20050416. 047-EN (16 April 2005).

⁶⁴ Jeremy Sarkin and Erin Daly, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies,' *Columbia Human Right Law Review* 35 (2004): 693.

⁶⁵ M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability,' *Law & Contemporary Problems* 59(4) (1996): 21.

⁶⁶ Declan Roche, 'Truth Commission Amnesties and the International Criminal Court,' *British Journal of Criminology* 45(4) (2005): 578.

considered to include the 'planners, leaders and persons who committed the most serious crimes,'⁶⁷ and could comprise the 'political, administrative and military leadership.' It is argued that 'any level of participation by any such persons is thus sufficient to bring them within the category of those to be prosecuted.'⁶⁸ This is reflected in the Rules of Procedure and Evidence of the ICTY, which require the tribunal:

in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the Tribunal's jurisdiction.⁶⁹

The International Criminal Tribunal for Rwanda (ICTR) follows a similar prosecutorial policy to comply with the UN Security Council's completion strategy for the tribunal.⁷⁰

More recently, the requirement that only those persons 'who bear the greatest responsibility for serious violations of international humanitarian law' be prosecuted has been codified in the Statute of the Special Court of Sierra Leone (SCSL).⁷¹ The UN Secretary General has interpreted the term 'greatest responsibility' as not limiting personal jurisdiction to political and military leaders by forming an element of the crime that must be proven, but rather as describing a prosecutorial strategy.⁷² However, given the limited resources of the SCSL, it is unlikely that lower-level offenders will be indicted. In the case of South Africa, however, these offenders fell within the jurisdiction of the TRC, which also investigated the most serious crimes.⁷³ Similar to the SCSL, the personal jurisdiction of the Cambodian Extraordinary Chambers has been limited, according to the law establishing them, to 'senior leaders of Democratic Kampuchea' and those who were 'most responsible' for the crimes falling within the temporal and subject-matter jurisdiction of the Extraordinary Chambers.⁷⁴ This wording clearly reveals the targets of investigations.⁷⁵

⁶⁷ Stahn, *supra* n 16 at 707.

⁶⁸ Hassan B. Jallow, 'Prosecutorial Discretion and International Criminal Justice,' *Journal of International Criminal Justice* 3(1) (2005): 152.

⁶⁹ ICTY, 'Rules of Procedure and Evidence' 29 March 2006, r 28(A), available at <http://www.un.org/icty/legaldoc-e/index.htm> (accessed 15 February 2007).

⁷⁰ Jallow, *supra* n 68 at 150.

⁷¹ SCSLSt. art. 1.

⁷² Cited in Abdul Tejan-Cole, 'The Complementary and Conflicting Relationships between the Special Court for Sierra Leone and the Truth and Reconciliation Commission,' *Yale Human Rights and Development Law Journal* 6 (2003): 147–8.

⁷³ *Ibid*, 148–9.

⁷⁴ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, 2001 (Cambodia), art. 1.

⁷⁵ Simon M. Meisenberg, 'The Cambodian Extraordinary Chambers,' BOFAXE, (Institute for International Law of Peace and Humanitarian Law, Ruhr-University Bochum, November 2004), available at <http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe/x287E.pdf> (accessed 15 February 2007).

The ICC is limited to bringing charges only against perpetrators of 'the most serious crimes of concern to the international community as a whole.'⁷⁶ This limitation to the court's jurisdiction is bolstered by admissibility requirements in Article 17 that state that the court shall find a case inadmissible where it 'is not of sufficient gravity to justify further action by the Court.' The Office of the Prosecutor has interpreted this as a requirement to 'focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the state or organization allegedly responsible for those crimes.'⁷⁷ It is not expected that lower-ranking combatants will appear before this court; instead, it is anticipated that they will be dealt with within the state where the crimes occurred.

In recent years, transitional states have developed increasingly intricate processes to treat offenders differently, depending on their perceived level of responsibility. For example, in Timor Leste, the UN Transitional Administration established a range of transitional justice mechanisms, including courts, a truth commission and a community reconciliation process (CRP). Offenders were assigned to an institution depending on the crimes that they had committed, with those individuals responsible for serious crimes such as murder, rape and torture facing prosecution, and individuals who had committed minor offences being dealt with by the CRP. Serious crimes were also investigated by the truth commission. Similarly, in Rwanda, following advice from international legal and policy experts,⁷⁸ the Rwandan National Assembly adopted legislation that established categories of genocide suspects based on their level of responsibility.⁷⁹ This system combines prosecutions for higher-level offenders with nonpenal sanctions for lower-level offenders, although it appears that the legislation is intended to ensure that the majority of offenders will face some form of penal sanction.

The policy of targeted prosecutions at the international level for those who are 'most responsible' can complement national amnesties as it assumes that the low-level offenders will be dealt with at the national level, through either prosecutions or an amnesty in conjunction with mechanisms such as lustration and truth commissions to hold individuals responsible without prosecuting them. A more flexible approach involving alternative mechanisms could provide a more realistic response to 'the varying levels of culpability amongst those who have committed atrocities,' with those who were obeying orders or acting under duress receiving more lenient treatment.⁸⁰

⁷⁶ ICCSt, Preamble and art. 5.

⁷⁷ Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (ICC, September 2003), 7.

⁷⁸ Jessica Raper, 'The *Gacaca* Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide,' *Pepperdine Dispute Resolution Law Journal* 5(1) (2005):1–56.

⁷⁹ *Loi Organique portant organisation, compétence et fonctionnement des Juridictions Gacaca chargées des poursuites et du jugement des infractions constitutives du crime de génocide et d'autres crimes contre l'humanité commis entre le 1er octobre 1990 et le 31 décembre 1994*, 16/2004 (2004) (Rwanda).

⁸⁰ Hethe Clark, *supra* n 55 at 405.

Truth Commissions as an Alternative to Formal Justice

According to the Amnesty Law Database, since the 1980s, 33 amnesty processes have been related to truth commissions,⁸¹ with the bulk of these commissions occurring after the South African TRC began operating. Truth commissions and amnesties can be related to one another in several ways. Firstly, an amnesty can be introduced before the establishment of a truth commission. This was the case in Chile, where the military junta had promulgated an amnesty law in 1978 to shield members of the armed forces from prosecution for the serious crimes that they had committed during the 'dirty war.' When a democratic government subsequently came to power in 1990, it found that, for several reasons, the amnesty was impossible to repeal, which led the president, Patricio Aylwin, to constitute a truth commission to achieve 'justice inasmuch as was possible.'⁸² Secondly, an amnesty can be introduced following a truth commission, as occurred in El Salvador. Here, the truth commission named individual perpetrators who were linked to the government, causing the government to respond by enacting an amnesty to protect those mentioned in the report.⁸³ Finally, an amnesty can be introduced in conjunction with a truth commission. This could mean either two independent mechanisms that are introduced simultaneously, such as occurred under the 1999 Lomé Accord that aimed to end the conflict in Sierra Leone⁸⁴ or a truth commission that has the power to grant amnesty. It is this latter relationship between the two forms of transitional justice that has sparked the most debate in recent years, following the South African TRC. Its appeal is based on two beliefs: that truth commissions make a positive contribution to reconciliation due to their more victim-centered nature and greater success in uncovering the truth about past events in comparison to prosecutions; and that providing amnesty encourages the involvement of the perpetrators, thereby contributing to a more balanced historical account of past events than would be the case if only the stories of victims were heard.

For an international court to consider a truth commission that offers amnesty in exchange for truth to be an adequate alternative to formal justice, there are a number of key requirements, which have been identified from the experience of the commissions that have operated to date. Firstly, the truth commission must be a separate institution created formally by law, rather than established through executive policy, as 'if the government were to create the commission, the life and work of the commission would be at the whim of the government.'⁸⁵ Secondly, the

⁸¹ For information on these truth commissions see Hayner *supra* n 21; Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

⁸² Terence S. Coonan, 'Rescuing History: Legal and Theological Reflections on the Task of Making Former Torturers Accountable,' *Fordham International Law Journal* 20 (1996): 539.

⁸³ Hayner, *supra* n 81 at 91.

⁸⁴ 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone ['Lomé Accord'] (Sierra Leone).

⁸⁵ Jeremy Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda,' *Human Rights Quarterly* 21(3) (1999): 805.

truth commission should pursue 'a restorative conception of justice that involves revealing the truth, repairing victim's harm and promoting reconciliation.'⁸⁶ Thirdly, the commissioners who are appointed should be 'perceived as above politics,'⁸⁷ so that the truth commission is not viewed as biased. Fourthly, the mandate of the truth commission should be broad enough 'to provide a more complete picture of the past.'⁸⁸ It is not clear, however, whether under international law a truth commission needs to investigate every violation that occurred or whether it could select representative cases to reconcile limited resources with the need to present a clear history. Where decisions are made to focus on particular events rather than all incidents, the factors influencing the decision should be transparent.

Once a truth commission has been established, amnesties should be granted individually to encourage each applicant to fulfill the necessary conditions, particularly the requirement to tell the truth. For those individuals who fail to adhere to the conditions, prosecutions should be pursued. Even where amnesty is granted, truth commissions should name individuals responsible for violations. To avoid conflict with the applicant's right to due process, any allegations should be substantiated by the commission and the named individual should be given the opportunity to reply either by an oral statement before the commission or in a written submission to be included in the 'commission's file.'⁸⁹ Publishing names is important: although amnesties result in the perpetrators evading criminal sanctions, naming names exposes the truth and holds perpetrators accountable for their actions.⁹⁰ By identifying individual perpetrators in publicized sessions or in the commission's report, there is the possibility that they will face some 'mental anguish in owning up to what one has been capable of.'⁹¹ Furthermore, they may have to carry 'the burden of potential or real social ostracism,' which could be a form of punishment.⁹² However, truth commissions should not impose penal sentences as they do not require the same standards of proof or evidence as courts.⁹³ Sarkin has advocated, however, in his study of the Amnesty Committee of the South African TRC, that legal standards such as the use of precedent should be employed to ensure that amnesty is granted fairly, and that 'procedures are being consistently applied to all.'⁹⁴

A victim's right to a remedy could be fulfilled by a truth commission, which pursues a restorative conception of justice, and treating offenders leniently may

⁸⁶ Roche, *supra* n 66 at 569.

⁸⁷ Eric Brahm, 'Truth Commissions' (June 2005), available at http://www.beyondintractability.org/essay/truth_commissions (accessed 15 February 2006); and Sarkin, *supra* n 85 at 805–10.

⁸⁸ Brahm, *supra* n 86.

⁸⁹ *Updated Set of Principles* *supra* n 22, Princ 9.

⁹⁰ Hayner, *supra* n 81 at 132.

⁹¹ Stephen A. Garrett, 'Models of Transitional Justice – A Comparative Analysis,' (presentation at International Studies Association 41st Annual Convention, Los Angeles, CA, 14–18 March 2000).

⁹² *Ibid.*

⁹³ Brahm, *supra* n 87.

⁹⁴ Sarkin, *supra* n 6 at 181.

reduce the risk of renewed hostilities. These benefits could be undermined, however, if the ICC prosecutor 'decided that perpetrators remained susceptible to international prosecution even when they have received an amnesty from a truth commission.'⁹⁵ It could even dissuade perpetrators from participating in the truth commission for fear of incriminating themselves by their own testimony. Roche argues instead that it would be more beneficial for international prosecutors:

to adopt a cooperative approach, and select cases to prosecute from the group of individuals who have failed to apply for amnesty, or those whose amnesty applications have been rejected.⁹⁶

This would make amnesties more valuable and offenders more inclined to apply for one. It could also 'enhance the effectiveness and legitimacy' of the international court, which 'would have a principled basis on which to allocate its scarce prosecutorial resources.'⁹⁷

Democratic Approval

For amnesties to be acceptable to international courts they should have democratic approval, as without it, an amnesty would be unlikely to 'serve the security and social-rehabilitation requirements of the transitional society.'⁹⁸ These requirements do not necessarily mirror those of international human rights law, as the former are focused on the community, whereas the latter are based on the rights of individuals.

Democratic approval can be expressed in various ways including through negotiated settlements involving representatives of all the parties to the conflict or transition process and international observers. Here, it is particularly important that representatives of the new transitional regime, especially if democratically elected, are present in order to enhance the legitimacy of the agreement.⁹⁹ If none of the representatives of any of the parties are elected, the process will have only limited democratic legitimacy, as although the spokespersons of all the main communities may participate in the negotiations, it is sometimes unclear whether those individuals themselves have a legitimate right to speak on behalf of others. The situation can be similarly compromised for amnesty laws that are approved by politicians who were not elected, or achieved their position following rigged elections.

An amnesty law would have greater legitimacy if it was approved by democratically elected politicians and there was widespread public consultation, either through an orchestrated consultation program,¹⁰⁰ an election-campaign promise to introduce an

⁹⁵ Roche, *supra* n 66 at 574.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 566.

⁹⁸ Sarkin, *supra* n 6 at 409–10.

⁹⁹ *Ibid.*

¹⁰⁰ For example, there was widespread consultation before the adoption of the *Promotion of National Unity and Reconciliation Act* (Act 34 of 1995) in South Africa.

amnesty¹⁰¹ or a referendum, either specifically on the amnesty law or on a new constitution that contains amnesty provisions.¹⁰² However, this can pose difficulties for transitional regimes as the complex questions concerning the timing and methods of consultation will clearly depend on the conditions within each transitional state, including the quality of the communication infrastructure and the extent of security concerns, particularly where public involvement during delicate negotiations could destabilize the process by undermining the mandate of the negotiators. However, consultations should, in principle, be as full and inclusive as circumstances permit.

Even where an amnesty law is approved by a referendum, difficulties could arise. For example, simple majority support will not be appropriate where minority groups were the targets of oppression.¹⁰³ Furthermore, after a referendum, it may be unclear whether the result truly reflects the will of the populace. For example, the Uruguayan referendum, where the population voted in favor of the amnesty law, is often lauded as an example of democratic approval. But it has been contended that the democratic politicians were intimidated by the still powerful army, that the Supreme Court disqualified many signatures from the petition that led to the referendum and that there were allegations of intimidation of voters by the police.¹⁰⁴ If these allegations are true, they undermine the extent of true democratic approval that the amnesty law received. This does not devalue the referendum process entirely however, as referendums, by inspiring public debate on the amnesty, can help it to foster reconciliation.

Despite all these difficulties, if an international court is faced with an amnesty that has democratic approval and widespread support among the population expressed through a referendum, it would be difficult for the court to intervene to conduct investigations without encountering both political and practical problems. Politically, the decision by a prosecutor to investigate in contravention of the clearly expressed view of the government and its people would be seen as an intrusion upon the state sovereignty of that country and possibly an imposition of culturally inappropriate processes and values. On a practical level, any international court wishing to prosecute individuals who had been granted amnesty would benefit from the support of the state in obtaining evidence and witnesses and arresting the accused, which would be unlikely to be granted if the investigation was unpopular. Such decisions will have to be made by international courts on a case-by-case basis.

Conclusion

This paper has shown that to date, international courts have been reluctant to recognize national amnesty laws; instead, they have frequently condemned them as

¹⁰¹ Amnesties were introduced to fulfill election pledges in Guatemala in 1982; Greece in 1973; USA in 1977; and Yugoslavia in 2001.

¹⁰² For example, a referendum was conducted on a new constitution containing amnesty provisions in Côte d'Ivoire in 2000.

¹⁰³ Sarkin and Daly, *supra* n 64 at 703.

¹⁰⁴ For a description of the referendum process in Uruguay see, Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (Chicago: University of Chicago Press, 1998).

violating the victims' rights to truth, justice and reparations. However, such condemnations have focused on automatic, unconditional amnesties that aimed to prevent investigations into human rights violations, as international courts have yet to consider more individualized, conditional amnesties that aim to promote peace and reconciliation.

This paper has argued that where amnesty is a necessary compromise to encourage combatants to disarm or dictators to transfer power to democratically elected leaders, it could be beneficial to both international courts and transitional states to cooperate in promoting victims' rights. In these instances, the work of the international courts could reinforce domestic institutions such as truth commissions by targeting only those individuals who are 'most responsible' or who have failed to fulfill the conditions attached to the amnesty process. It has been argued that such a prosecutorial strategy would both encourage combatants to participate in the amnesty process and enhance the legitimacy and transparency of the international courts, whilst making more effective use of limited resources.

The author has suggested criteria upon which courts could base their decisions on whether to intervene in domestic amnesty processes.

1. Amnesty should have democratic legitimacy:

Amnesties must be introduced with democratic approval following, as far as possible, widespread public consultation involving all stakeholder groups in the society concerned. Such assessments can depend on the legitimacy of the negotiators to the peace treaty, the fairness by which political representatives were appointed to the legislature or whether intimidation was used during a referendum campaign. Such considerations would further need to take into account the infrastructure in place when the amnesty was introduced to determine, in the absence of a referendum, whether it would have been possible to conduct a fair public vote on the amnesty.

2. Amnesty should represent a genuine desire to promote peace and reconciliation:

The amnesty law must be aimed at genuinely promoting peace and reconciliation, rather than simply providing immunity for certain groups of individuals. Clearly, this is a wide-ranging criterion that could encompass the scope of the amnesty law itself, the resources that are contributed to its implementation and whether the amnesty is part of an overarching program of institutional reform.

3. Amnesty should be limited in scope:

The provisions of the amnesty law itself should be as limited as possible. For example, those who are 'most responsible' could be excluded or the most serious crimes could be exempted from the amnesty. Alternatively, the amnesty could only apply to members of particular organizations who agree to engage with democratic and peaceful systems of government. Governmental decisions on how far to restrict domestic prosecutions may be constrained by many factors, including: the relative strength of the various political players or armed forces in the transition; the resources available for complex and expensive prosecutions; the number of

perpetrators involved; and, where appropriate, the need to cooperate with international tribunals.

4. Amnesty must be conditional:

The application of an amnesty can be further limited by requiring that recipients adhere to conditions such as revealing the truth in exchange for amnesty, or showing remorse for their previous actions either through public apologies or by demonstrable actions such as community service and surrendering weapons. The conditions could be elements of a stand-alone amnesty process or they could be implemented by other transitional justice mechanisms that accompany the amnesty, such as truth commissions or community-based justice processes. These mechanisms should aim to disclose as much truth as possible and could entail some noncriminal sanctions for the perpetrators, such as vetting. Conditional amnesties should be individualized, and the institutions that determine whether the conditions have been met must be independent and representative of the population. For those individuals who fail to comply, prosecution should be pursued.

5. Amnesty must be accompanied by reparations:

Amnesties should be accompanied by reparations programs that provide compensation for victims and their families, whilst also taking measures to memorialize the past and prevent similar violations recurring, which could include lustration or vetting programs. Clearly, determining whether appropriate remedies have been made available to the victims can be a complicated process due to the diverse and changing nature of the victims' views and the resource constraints that constrict the ability of a transitional government to act, particularly where reparations need to be balanced against promoting development within the country. Furthermore, many of the non-monetary forms of reparations can be difficult to offer immediately. For example, providing victims with medical and psychological care may first entail training professionals to fulfill this role and building institutions such as hospitals where the care can be provided – all of which can be expensive for transitional states. Therefore, attempts to evaluate whether appropriate alternative remedies have been made available to victims should consider whether the forms of reparations that are possible to grant early on in a transition, such as instituting a national day of commemoration, are pursued. Furthermore, consideration should be given to whether the state has acted to fulfill its duty to investigate by, *inter alia*, preserving archives relating to the transition, investigating disappearances and instituting truth-recovery mechanisms. In addition, the extent to which the government consulted the victims when establishing alternative remedies and instituted policies to encourage their participation should be evaluated.

While it is preferable that perpetrators of heinous crimes are brought to justice, often, threatening to indict combatants or members of dictatorial regimes can prolong violence and lead to further human rights violations being committed. Therefore, in such instances, the decision to introduce an individualized, conditional amnesty law in order to achieve peace may be a reasonable response to a

complex situation. Where this is the case, it is important that international courts adopt a pragmatic approach where each amnesty will be evaluated on a case-by-case basis. To date, this has not occurred as international courts have faced only blanket amnesties, but this overview of the potential criteria on which international courts could base their decisions is particularly timely as it is likely that, as states become more innovative in their approaches to transitional justice, the courts will no longer be able to make sweeping statements condemning amnesty laws. Instead, they will have to rule on specific provisions within the amnesties themselves, many of which will involve political decisions.